Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1288

ETHAN WILT, et. al.,

Petitioners

— vs —

STATE BOARD OF EDUCATION, et. al.,

Respondents.

RESPONDENTS' JOINT APPENDIX TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

	Page
1. Order entered by Chief Judge Frank J. Battisti, August 15, 1979 in *Wilt v. State Board of Education.*	RA1
2. Order entered by Circuit Judge Anthony Celebrezze, August 31, 1979 denying stay pending appeal in *Wilt v. State Board of Education.*	RA2
3. Complaint in *Stromberg v. Board of Education, et al.*, Case No. 78-987399 in Common Pleas Court of Cuyahoga County, Ohio.	RA4
4. Amended Complaint in *Stromberg v. Board of Education, et al.*, Case No. 78-987399, Common Pleas Court of Cuyahoga County, Ohio.	RA7
5. Motion of State Board of Education to Dismiss in *Stromberg v. Board of Education, et al.*, Case No. 78-987399, Common Pleas Court of Cuyahoga County, Ohio.	RA11
6. Motion of State Board of Education to Dismiss Cross-Claim in *Stromberg v. Board of Education, et al.*, Case No. 78-987399, Common Pleas Court of Cuyahoga County, Ohio.	RA12
7. Motion of Cleveland Board of Education to Dismiss in *Stromberg v. Board of Education, et al.*, Case No. 78-987399, Common Pleas Court of Cuyahoga County, Ohio.	RA15
8. Order and Judgment of Judge Richard M. Markus in the *Stromberg* case rendered on May 31, 1979.	RA17
9. Order of Judge Richard M. Markus in the *Stromberg* case dated June 22, 1979.	RA19

Page

10. Notice of Appeal filed June 27, 1979, in *Stromberg v. Board of Education, et al.*, Case No. 987399, Court of Common Pleas, Cuyahoga County, Ohio. RA21

11. Decision and Journal Entry of Court of Appeals in Case No. 41011 denying Stromberg's Motion to Stay Proceedings, dated August 14, 1979. ..... RA22

12. Decision and Opinion of Court of Appeals in Case No. 41011, affirming judgment of Court of Common Pleas. RA28

13. Propositions of Law set forth in Memorandum in Support of Jurisdiction in *Stromberg* filed in the Supreme Court of Ohio, Case No. 80-126, January 29, 1980. ..... RA32

14. Notices of the Clerk of the Supreme Court of the United States regarding denials of stay of execution of the judgment of the Supreme Court of Ohio, dated June 20 and June 26, 1978 (*Bratenahl I*). RA34

15. Table of Contents and Petition for Writ of Certiorari filed in U.S. Supreme Court on August 1, 1978, by Bratenahl Board of Education (*Bratenahl I*). RA36

16. Notice of the Clerk of the Supreme Court of the United States regarding denial of Bratenahl's petition for a writ of certiorari, dated October 2, 1978 (*Bratenahl I*). RA39

17. Ohio Revised Code 3311.29 (Eff. 12-1-67). RA40

18. Ohio Revised Code 3311.29 (Eff. 9-30-75). RA41

19. *Wiss v. Cuyahoga County Board of Elections*, 61 Ohio St. 2d — (1980) (published Ohio Bar, Vol. LIII, No. 11, March 17, 1980). RA42

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHAN WILT, et al., *Plaintiff*	)	
— vs —	)	C79-1579
STATE BOARD OF EDUCATION, et al., *Defendants*	)	**ORDER**
Battisti, C.J.	)	

Plaintiffs have filed this complaint as a case related to *Reed v. Rhodes*, Case No. C73-1300. The plaintiffs' complaint presents the issues of the disbursement of monies raised for the use and benefit of the Bratenahl Local School District and the transfer of properties listed in the name of the Bratenahl Local School District to the Cleveland City School District. These issues are related to the general dissolution of the Bratenahl Local School District. In contrast, *Reed v. Rhodes*, concerns the violation of the Equal Protection Clause by the Cleveland City School District. For this reason, plaintiffs' complaint is not related to *Reed v. Rhodes*, and shall be assigned by Clerk of Court according to random draw. It should be noted that the reassignment of students from the Bratenahl Local School District to the Cleveland City School District and the use of Bratenahl Local School District properties by the Cleveland City School District would be matters related to *Reed v. Rhodes*, but are not raised in this complaint.

IT IS SO ORDERED.

FRANK J. BATTISTI
Chief Judge

Dated:
August 15, 1979

No. 79-3580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETHAN WILT, et al.,
Plaintiffs, Appellants,

v.

CLEVELAND BOARD OF EDUCATION, et al.,
Defendants - Appellees.

ORDER

Plaintiffs-appellants by their counsel, appeared before the undersigned in Court Room No. 135 of the U. S. District Court for the Northern Division of Ohio at 2:00 p.m., and pursuant to Rule 8, Federal Rules of Appellate Procedure, presented their motion with supporting memorandum and argument for a stay pending appeal to this Court of a formal order of the United States District Court for the Northern District of Ohio, entered August 30, 1979 dismissing in part certain of plaintiffs-appellants' claims, and granting defendants-appellees' motion for summary judgment on plaintiffs-appellants' other claims. The District Court further denied plaintiffs-appellants' motion for a stay pending appeal.

The defendants-appellants by their respective counsel appeared in opposition to the stay pending appeal.

Since it was apparent that exceptional circumstances existed which excused filing of said Motion for Stay with the Clerk of the Court for consideration by a panel or division of the Court, Accordingly,

Application was properly made to the undersigned for determination as a single Judge, pursuant to Rule 8(a) Federal Rules of Appellate Procedure.

The primary thrust of plaintiffs-appellants complaint is to prevent defendant-appellees from dissolving and merging the Bratenahl Local School District into the

Cleveland City School District alleging violation of rights guaranteed by the Federal Constitution and Laws.

With the exception of the conspiracy count all other matters raised have been adjudicated by the state courts in protracted litigation since 1970.

Upon consideration of the arguments of the respective counsel and the briefs of the parties, and the reasons stated by Judge John Manos in his opinion rendered August 30, 1979, the undersigned concludes that the same should be denied.

In light of the fact that the Board of Education of the Bratenahl Local School District adopted a resolution on June 8, 1968, that effective July 1, 1970 the Bratenahl Local School District would cease to exist and made part of the Cleveland City School District. And, further this matter having been presented to the Supreme Court of Ohio for various reasons four times, and certiorari having been denied by the U. S. Supreme Court.

While it is not necessary at this juncture to make any final determination of the issues which may ultimately be raised on appeal, I find no probability of appellants - prevailing upon their appeal, and in my judgment the issues are not sufficiently substantial as to warrant granting the stay especially in the face of its denial by the District Judge after hearing.

It is hereby ordered that the motion for stay pending appeal ought to be, and it hereby is, Denied. It is further ordered that the Clerk of Court set this cause for hearing on the merits on or before September 21, 1979.

It is so ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge

Dated
August, 31, 1979

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG
324 Corning Drive
Bratenahl, Ohio 44108, on behalf of himself and all others similarly situated.
Plaintiff

- vs -

BOARD OF EDUCATION, VILLAGE OF BRATENAHL, OHIO
11404 Lake Shore Boulevard
Bratenahl, Ohio 44108

and

BOARD OF EDUCATION CITY OF CLEVELAND, OHIO
1380 East 6th Street
Cleveland, Ohio 44114

and

DEPARTMENT OF EDUCATION STATE OF OHIO
65 South Front Street
Columbus, Ohio 43215

and

WILLIAM J. BROWN ATTORNEY GENERAL STATE OF OHIO
17th Floor
30 East Broad Street
Columbus, Ohio 43215
Defendants

Judge

Case No. 78 987399

Complaint
(filed August 14, 1979)

1. Plaintiff is a taxpayer, resident and elector of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

2. Plaintiff brings this class action on behalf of himself and all others similarly situated as residents, taxpayers and electors of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

3. The approximate number of members of this class exceeds 1,000 and is so numerous that joinder of all members is impractical.

4. The questions of law and fact relative to this controversy are common to all members of the class; that Plaintiff's claim is typical to the claim of the class; that Plaintiff will fairly and equitably project the interest of the class.

5. Adjudication as to this Plaintiff would be dispositive of the interest of the other members of this class not parties to this action and the questions of law and fact common to the members of this class predominate any questions affecting individual members and that this class action is the only means available for the fair and efficient adjudication of this controversy.

6. Plaintiff states that the Defendant, the Ohio State Department of Education, under the authority of Section 3311.29 R.C., has issued an order merging the Bratenahl School District with the Cleveland School District; that Section 3311.29 R.C. includes a mandatory directive transferring funds and property of the merging school district to the new school district; that by reason thereof, the transfer order contained in Section 3311.29 R.C. conveys funds and property of the Bratenahl School District to the Defendant, Cleveland School Board, in excess of $1,000,000.00; that Plaintiff and all members of this class, as taxpayers, have an equitable interest in said property and funds, and that said property and funds are held in trust for them by the Defendant, Bratenahl Board of Education.

7. Plaintiff states that Section 3311.29 R.C., providing for the mandatory transfer of property and funds by administrative order of merger from one school district to another is constitutionally repugnant and in violation of the due process clause of the Constitutions of the United States and the State of Ohio.

8. The transfer and conveyance of said funds and property to the Defendant, Cleveland Board of Education, by reason of said order of merger issued by the Defendant, Ohio State Department of Education, will cause Plaintiff and all members of the class to suffer irreparable damage.

WHEREFORE, Plaintiff demands that the Court adjudge:

1. That Section 3311.29 R.C., authorizing the merger of school districts and including the mandatory transfer and conveyance of funds and property by administrative order from one district to another is unconstitutional.

2. That the order and/or orders pending and issued by the Ohio Department of Education under authority of Section 3311.29 R.C. are invalid.

3. That the Defendant, Ohio Department of Education, as well as the Defendant, Cleveland Board of Education and Bratenahl Board of Education, be temporarily restrained and enjoined from enforcing and/or instituting said order of merger, and that said injunctive relief be made permanent upon the final hearing of this cause.

4. That the Court make a determination of the fair and reasonable value of the services rendered by Plaintiff's attorney and that he be granted an order allowing payment of said attorney's fees, together with his costs.

JAMES A. CHIARA
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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG
324 Corning Drive
Bratenahl, Ohio 44108, on behalf of himself and all others similarly situated.
Plaintiff

vs

BOARD OF EDUCATION
VILLAGE OF
BRATENAHL, OHIO
11404 Lake Shore Boulevard
Bratenahl, Ohio 44108

and

BOARD OF EDUCATION
CITY OF CLEVELAND,
OHIO
1380 East 6th Street
Cleveland, Ohio 44114

and

OHIO STATE BOARD OF
EDUCATION
Julie Williams, Clerk
Room 808
65 South Front Street
Columbus, Ohio 43215

and

WILLIAM J. BROWN,
ATTORNEY GENERAL
STATE OF OHIO
17th Floor
30 East Broad Street
Columbus, Ohio 43215
Defendants

Case No. 78 987399

Amended Complaint
(filed August 22, 1979)

1. Plaintiff is a taxpayer, resident and elector of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

2. Plaintiff brings this class action on behalf of himself and all others similarly situated as residents, taxpayers and electors of the Village of Bratenahl, County of Cuyahoga and State of Ohio.

3. The approximate number of members of this class exceeds 1,000 and is so numerous that joinder of all members is impractical.

4. The questions of law and fact relative to this controversy are common to all members of the class; that Plaintiff's claim is typical to the claim of the class; that Plaintiff will fairly and equitably project the interest of the class.

5. Adjudication as to this Plaintiff would be dispositive of the interest of the other members of this class not parties to this action and the questions of law and fact common to the members of this class predominate any questions affecting individual members and that this class action is the only means available for the fair and efficient adjudication of this controversy.

6. Plaintiff states that the Defendant, the Ohio State Board of Education, under the authority of Section 3311.29 R.C. has issued an order merging the Bratenahl School District with the Cleveland School District; that Section 3311.29 R.C. includes a mandatory directive transferring funds and property of the merging school district to the new school district; that by reason thereof, the transfer order contained in Section 3311.29 R.C. conveys funds and property of the Bratenahl School District to the Defendant, Cleveland School Board, in excess of $1,000,000.00; that Plaintiff and all members of this class, as taxpayers, have an equitable interest in said property

and funds, and that said property and funds are held in trust for them by the Defendant, Bratenahl Board of Education.

7. Plaintiff states that Section 3311.29 R.C., providing for the mandatory transfer of property and funds by administrative order of merger from one school district to another is constitutionally repugnant and in violation of the due process clause of the Constitutions of the United States and the State of Ohio.

8. The transfer and conveyance of said funds and property to the Defendant, Cleveland Board of Education, by reason of said order of merger issued by the Defendant, Ohio State Board of Education, will cause Plaintiff and all members of the class to suffer irreparable damage.

WHEREFORE, Plaintiff demands that the Court adjudge:

1. That Section 3311.29 R.C., authorizing the merger of school districts and including the mandatory transfer and conveyance of funds and property by administrative order from one district to another is unconstitutional.

2. That the order and/or orders pending and issued by the Ohio State Board of Education under authority of Section 3311.29 R.C. are invalid.

3. That the Defendant, Ohio State Board of Education, as well as the Defendant, Cleveland Board of Education and Bratenahl Board of Education, be temporarily restrained and enjoined from enforcing and/or instituting said order of merger, and that said injunctive relief be made permanent upon the final hearing of this cause.

4. That the Court make a determination of the fair and reasonable value of the services rendered by Plaintiff's attorney and that he be granted an order allowing payment of said attorney's fees, together with his costs.

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Attorneys for the Plaintiff

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG *Plaintiff* v. BOARD OF EDUCATION, VILLAGE OF BRATENAHL, OHIO, et al. *Defendants*	)	**Case No. 78 987399** **Judge Frank J. Gorman** **Motion To Dismiss**

Now comes the Defendant Ohio State Board of Education, and respectfully moves this Court to dismiss the instant action against it because it is entitled to judgment as a matter of law for the following reasons: (1) the matter in issue between the Plaintiffs and the Defendant Ohio State Board of Education has been the subject of a prior final adjudication on its merits by the Ohio Supreme Court as between these parties, rendering the cause of action in the present action res judicata between these parties, (2) in the alternative, Plaintiffs are barred from maintaining this action by the doctrines of laches and equitable estoppel, (3) Plaintiffs have failed to state a claim upon which relief can be granted, and, (4) Plaintiffs do not have standing to maintain this action.

A Memorandum in Support of said Motion to Dismiss is attached hereto and Defendant respectfully requests that said Memorandum also be considered its response to Plaintiffs' Request for Preliminary Injunctive Relief in this action.

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Attorneys for Defendant
Ohio State Board of Education

Respectfully submitted,
WILLIAM J. BROWN
Attorney General

GARY E. BROWN
Assistant Attorney General

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG, *Plaintiff,* vs. BOARD OF EDUCATION VILLAGE OF BRATENAHL, OHIO and BOARD OF EDUCATION CITY OF CLEVELAND, OHIO and OHIO STATE BOARD OF EDUCATION and WILLIAM J. BROWN, ATTORNEY GENERAL STATE OF OHIO *Defendants.*	)	**Case No. 78 987399**

MOTION OF DEFENDANT, STATE BOARD OF EDUCATION OF OHIO, TO DISMISS THE CROSS-CLAIM OF DEFENDANT, BOARD OF EDUCATION OF BRATENAHL LOCAL SCHOOL DISTRICT

Defendant, State Board of Education of Ohio, moves this court for an order dismissing the cross-claim of defendant, Board of Education of Bratenahl Local School District against defendant, State Board of Education of Ohio, for the following reasons:

1. The Supreme Court of Ohio in the case of *State ex rel. Board of Education of Bratenahl Local Local School District v. State Board of Education,* 53 Ohio St. 2d 173, decided March 22, 1978, *cert. den.* by United States Supreme Court, October 2, 1978, *specifically held* that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the State Board of Education, and the Bratenahl Board of Education, therefore, lacks the capacity and authority to assert the cross-claim in question.

2. The judgment rendered by the Supreme Court of Ohio, in the case of *State, ex rel. Board of Education of Bratenahl Local School District v. State Board of Education,* 53 Ohio St. 2d 173, decided March 22, 1978, *cert. den.* by United States Supreme Court, October 2, 1978, is *res judicata* with respect to the issues set forth in the cross-claim in question, and the cross-claim, therefore, fails to state a claim upon which relief can be granted.

3. The judgment rendered by the Supreme Court of Ohio in the case of *State, ex rel. Board of Education of Bratenahl Local School District v. State Board of Education,* 53 Ohio St. 2d 173, decided March 22, 1978, *cert. den.* by United States Supreme Court October 2, 1978, renders the issues of the cross-claim concerning the 1974 dissolution order moot, and the cross-claim, therefore, fails to state a claim upon which relief can be granted.

4. The judgment rendered by the Court of Appeals, Franklin County, Ohio, in the case of *State, ex rel. Board of Education, Bratenahl Local School District v. State Board of Education,* Case No. 78AP-414, decided April 29, 1978, is *res judicata* with respect to the issues set forth in the cross-claim in question, and the cross-claim, therefore fails to state a claim upon which relief can be granted.

5. The jurisdiction of the Court of Appeals, Franklin County, Ohio, having been first invoked by the

Board of Education of Bratenahl Local School District in the case of *State, ex rel. Board of Education, Bratenahl Local School District v. State Board of Education,* Case No. 78AP-414 in that court, to determine the issues raised by the Bratenahl Board in its Cross Complaint in the present case, the jurisdiction of the Court of Appeals, Franklin County, Ohio, excludes any other court from adjudicating those issues.

WILLIAM J. BROWN
Attorney General

GARY E. BROWN
Assistant Attorney General

JOHN D. HOLSCHUH
Special Counsel for the
Attorney General
Alexander, Ebinger,
Holschuh, Fisher
& McAlister

Attorneys for Defendant and
Cross-Claim Defendant,
State Board of Education

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG, *Plaintiff,* vs. BOARD OF EDUCATION, VILLAGE OF BRATENAHL, OHIO, et al., *Defendants.*	)	**Case No. 78-987399**
	)	**Motion To Dismiss of Board of Education, City of Cleveland, Ohio With Brief Attached**

Now comes the defendant, Board of Education of the City of Cleveland (hereafter Cleveland Board), and respectfully moves this Court to dismiss the instant action against it because it is entitled to judgment as a matter of law for the following reasons: (1) it is not a necessary party to the resolution of the issue which is the subject matter of this lawsuit which is solely between the plaintiffs and the defendant Ohio State Board of Education; (2) pertaining to the subject matter of the within cause of action, this defendant has no discretion under the applicable statutes of Ohio within which to act or not act, but is subject solely to the lawful directives of the Ohio State Board of Education; (3) the matter in issue between the plaintiff and the defendants has been the subject of a prior final adjudication on the merits by the Ohio Supreme Court, rendering the cause of action and the present action res judicata; (4) plaintiffs are collaterally estopped from attacking the Ohio Supreme Court's prior adjudication of the issues present in this case; (5) alternatively, plaintiffs are barred from maintaining their action by the doctrines of laches and equitable estoppel; (6) plaintiffs have failed to state a claim upon which relief can be granted, and; (7) plaintiffs do not have standing to maintain this action.

A Brief in Support of this Motion to Dismiss is attached hereto. This defendant respectfully submits that

this attached Brief is also submitted for consideration of the Court as this defendant's response to plaintiffs' Request for Preliminary Injunctive Relief in this action.

Respectfully submitted,
JOHN M. BAKER
Counsel for Defendant
Board of Education,
City of Cleveland, Ohio

Of Counsel:

WESTON, HURD, FALLON, PAISLEY & HOWLEY

STATE OF OHIO } ss:
COUNTY OF CUYAHOGA }

In The Court of Common Pleas
Case No. 987399
Judge Richard M. Markus

SIDNEY STROMBERG
Plaintiff,
vs.
BOARD OF EDUCATION, et al.
Defendants

Order and Judgment

This case is the subject of Motions to Dismiss by the Ohio State Board of Education directed to the complaint filed by the plaintiff and the cross claim filed by the Bratenahl Board of Education. On February 15, 1979, this Court ordered a stay of all proceedings in this case until the Ohio Supreme Court ruled on related litigation. That related case was decided by the Ohio Supreme Court in *State, ex rel. Board of Education of Bratenahl v. State Board of Education,* 58 Ohio St. 189 (decided May 16, 1979).

Following that decision by the State Supreme Court, this Court advised all counsel that final disposition would be made in the present case on May 31, 1979, unless they could present written justification for any other action prior to that date. The Court has received written communications from several counsel. Although this individual judge does not agree with the decisions rendered by the Ohio Supreme Court in litigation involving most of the same parties, this Court is obliged to accept and follow the decisions of the Ohio Supreme Court. Believing that the cited decision by the Ohio Supreme Court causes the issues of the present case to be *res judicata,* this Court is obliged to grant the Motions to Dismiss. The various arguments raised by counsel were or could have been

considered in the related litigation between substantially the same parties. As stated in this Court's previous memorandum, the taxpaper-citizens are bound by litigation involving the governmental entity representing their interests.

For the above reasons this action is dismissed with prejudice at plaintiff's costs.

RICHARD M. MARKUS, Judge

Dated: May 31, 1979

STATE OF OHIO
COUNTY OF CUYAHOGA } ss:

In The Court of Common Pleas Case No. 78-987399

SIDNEY STROMBERG
Plaintiff,
vs.
BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT, et al.
Defendant.

Order

This matter comes before the Court on plaintiff's motion for reconsideration. Although this individual Judge has repeatedly indicated his disagreement with the decisions by the Ohio Supreme Court on this matter, this Court is obliged to accept and follow those decisions. It appears to this individual Judge that the position of the plaintiff and the Bratenahl Board of Education has legal and equitable merit, but an orderly system of justice requires this Court to apply the principles of *res judicata.*

A prior adjudication of the same issues involved here bars relitigation of those issues. For the purpose of *res judicata* principles, issues are the fundamental rights or causes of action, rather than the reasons or grounds for resolving disputes about those rights or causes of action. Issues as to the existence of the Bratenahl School Board or the propriety of a State School Board Order dissolving that district cannot be relitigated on the basis that additional constitutional arguments are being raised in the new litigation. Nor can those basic issues be relitigated on the basis that citizens-taxpayers previously represented by a governmental entity now wish to reassert those claims themselves.

For all those reasons, the previous dismissal was required as a matter of law. Since this Court did consider

the content of the suit decided by the Ohio Supreme Court, one might conclude that the previous order should have been the grant of summary judgment rather than the grant of a motion to dismiss. The law is unclear whether this Court may take judicial notice of related litigation in the State Supreme Court, but there was affidavit evidence before this Court containing the same material. Therefore, the previous order should have read that the motion to dismiss this action is granted, or alternatively, the motion to dismiss is treated as a motion for summary judgment and granted. With that correction and modification, the motion for reconsideration is denied.

RICHARD M. MARKUS, Judge

Date: June 22, 1979.

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIDNEY STROMBERG *Plaintiff-Appellant* - vs - BOARD OF EDUCATION, ET AL. *Defendants-Appellees*	**Case No. 987399** **Notice of Appeal** (filed June 27, 1979)

Notice is hereby given that Sidney Stromberg, plaintiff, hereby appeals to the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, from the order and final judgment dismissing plaintiff's complaint with prejudice entered in this action on the 31st day of May, 1979.

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COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA
GERALD E. FUERST, CLERK OF COURTS

SIDNEY STROMBERG
Appellant
- vs -
BOARD OF EDUCATION,
ET AL.
Appellees

Court of Appeals No. 41011

Lower Court No. 987,399

Motion No. 45047

Date Aug. 14, 1979
KRENZLER, P. J.:

JOURNAL ENTRY

Sidney Stromberg, a Bratenahl taxpayer, brought a taxpayer's suit attacking the constitutionality of R.C. 3311.29. The lower court dismissed the taxpayer's action on the ground that two Ohio Supreme Court decisions, *State, ex rel. Bd. of Ed. of Bratenahl Local Sch. Dist. v. State Bd. of Ed.* (1978), 53 Ohio St. 2d 173, and *State, ex rel. Bd. of Ed. v. State Bd. of Ed.* (1979), 58 Ohio St. 2d 189, were res judicata of the issue raised. The taxpayer has appealed from the dismissal of its lawsuit, and, in addition, seeks a stay of proceedings during the pendency of this appeal, prohibiting the State Board of Education from taking any action merging Bratenahl Local School District with the Cleveland City School District. The motion for a stay of proceedings is before us at the present time and will be the subject of our ruling herein.

In order to comprehend the nature of the motion, it is necessary to review the lengthy history of the litigation involving the State Board of Education and the Bratenahl School District.

The present controversy has been the subject of litigation for the past eleven years culminating in two decisions by the Ohio Supreme Court, *State, ex rel. Bd. of Ed. v. State Bd. of Ed., supra; State, ex rel. Bd. of Ed. of Bratenahl Local Sch. Dist. v. State Bd. of Ed., supra.* Foremost among the issues presented throughout litigation was that of the forced dissolution of the Bratenahl Local School District due to its non-compliance with R.C. 3311.29.

In 1968, the State Board of Education ordered the dissolution of the Bratenahl school system effective July 1, 1970, as a result of its non-compliance with R.C. 3311.29. While Bratenahl maintained only kindergarten through eighth grades, the statute required all school districts to maintain public schools consisting of grades one through twelve.

On March 22, 1978, in 53 Ohio St. 2d 173, the Ohio Supreme Court held that the July 1, 1970 dissolution order of the Ohio State Board of Education was final and valid, and thus, that the Bratenahl Local School District had been properly dissolved on that date.

After the foregoing decision, the Bratenahl Local School District, not yet having been dissolved, filed additional motions for rehearing and a stay of execution of the judgment. Bratenahl's application to the Supreme Court of the United States for a stay of execution of the judgment of the Supreme Court of Ohio was denied. Bratenahl then sought a writ of certiorari to the U. S. Supreme Court, which was also denied October 2, 1978. 58 L. Ed. 2d 175.

On June 28, 1978, Bratenahl filed a complaint in prohibition and mandamus in the Court of Appeals of Franklin County seeking to enjoin the dissolution of the Bratenahl Local School District and for an order that the State Board of Education act on Bratenahl's request for evaluation and accredition. An appeal from this decision to the Ohio Supreme Court was dismissed sua sponte in a unani-

mous decision. The court held that the complaint failed to state a claim upon which relief could be granted. Moreover, it was held that review of the issues sought to be raised by the complaint were barred by the Ohio Supreme Court decision in *State, ex rel. Bd. of Ed. of Bratenahl Local Sch. Dist. v. State Bd. of Ed.* 1978), 53 Ohio St. 2d 173. *State, ex rel. Bd. of Ed. v. State Bd. of Ed.* (1979), 58 Ohio St. 2d 189.

The earlier decision in 53 Ohio St. 2d 173 was thus held to be res judicata as to the issues raised in the mandamus and prohibition action.

It should be noted that, throughout this eleven-year period of litigation, no decision had ever been rendered with regard to the constitutionality of R.C. 3311.29.

The foregoing summarizes the prior history of the instant case.

The present taxpayer's action was filed in the Common Pleas Court of Cuyahoga County on August 2, 1978, shortly before a decision was due on Bratenahl's petition to the U.S. Supreme Court for a writ of certiorari in 53 Ohio St. 2d 173. Pending the second appeal to the Supreme Court of Ohio, Judge Markus, on February 15, 1979 stayed all proceedings on this case pending another decision by the Supreme Court of Ohio, noting:

> "While the complaint in that new action sounds in prohibition and mandamus, the substance of that action and the relief sought are substantially the same as the action in this Court for injunctive relief. The action filed in Franklin County Appeals Court (which is now on appeal to the Ohio Supreme Court) clearly resembles the present action in this Court, since both actions challenge the 1974 State School Board order and assert the continued existence of the Bratenahl school district."

Following the second Ohio Supreme Court decision in 58 Ohio St. 2d 189, Judge Markus, on May 31, 1979, entered an order sustaining the defendants' motion to

dismiss this action ruling that the Ohio Supreme Court decision caused the issues of the present case to be res judicata. Judge Markus further stated:

> "The various arguments raised by counsel were or could have been considered in the related litigation between substantially the same parties. As stated in this Court's previous memorandum, the taxpayer-citizens are bound by litigation involving the governmental entity representing their interests."

The precise issue in the taxpayer's appeal is whether the statute in issue, R.C. 3311.29, is constitutional. The state's position is that the previous litigation is res judicata of the issue, is binding on the taxpayer, and therefore, that the present appeal should be dismissed and that Judge Markus' decision be affirmed.

Because the present appeal involves two distinct issues, the first being whether the previous litigation is considered res judicata as to the present case, and secondly, whether the present statute, R.C. 3311.29 is constitutional, and because of the imminent nature of this appeal, we have decided in the interests of judicial economy and efficiency to state our views on both issues although we are presently called upon only to consider the motion to stay. We are proceeding in this manner inasmuch as denial of the motion to stay would ultimately moot the issues on appeal because the Bratenahl School System would be dissolved by the time the appeal would be heard and ruled upon.

We have reviewed the past litigation involved in the instant case and it is our conclusion that the issue on appeal could have been raised by the Bratenahl Board of Education in previous litigation. Therefore, the doctrine of res judicata applies to the Bratenahl Board of Education. Further, because the Bratenahl taxpayer was represented by the Bratenahl School District. and the issue of

constitutionality was not raised, the taxpayer is now precluded from raising this issue.

Accordingly, we find that the trial court was correct in concluding that the doctrine of res judicata applies.

As to the issue of constitutionality of R.C. 3311.29, it is noted that a court has the right to determine whether a legislative act, drawn into question in a suit pending before it, is opposed to either the United States or Ohio Constitutions, or both, and to strike down any act which clearly conflicts with the Constitution.

R.C. 3311.29 read as follows during the relevant period:

> "§ 3311.29 School district must maintain public school; exceptions.
>
> "No school district shall be created and after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.
>
> "The superintendent of public instruction is without authority to distribute funds under sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education."

We have reviewed the language of this section. It is our view that the provisions of R.C. 3311.29 are clear, definite and unambiguous, fair and reasonable, and not arbitrary or discriminatory. Therefore, we hold that R.C. 3311.29 is constitutional.

The motion for stay of proceedings is denied.

KRUPANSKY, J.,
CORRIGAN, J., Concur

ALVIN I. KRENZLER
Presiding Judge

Dated:
August 14, 1979

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 41011

SIDNEY STROMBERG, *Appellant,*	**Appeal From Common Pleas Court No. 987,399**
— vs —	
BOARD OF EDUCATION et al., *Appellees.*	**Journal Entry And Opinion**

Date December 6, 1979
COOK, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This is an appeal from a judgment dismissing appellant's complaint on the basis of res judicata.

Appellant, a resident and a taxpayer of the village of Bratenahl, filed a taxpayer's suit in the Cuyahoga County Common Pleas Court seeking a declaration that R.C. 3311.29 is unconstitutional because it is in contravention of the Constitutions of the State of Ohio and the United States. The trial court dismissed appellant's action on the ground that two Ohio Supreme Court decisions, State ex rel. Bd. of Ed. of Bratenahl Local Sch. Dist. v. State Bd. of Ed. (1978), 53 Ohio St. 2d 173 and State ex. rel. Bd. of Ed. v. State Bd. of Ed. (1979), 56 Ohio St. 2d 189, were res judicata of the issue raised.

The appellant has filed five assignments of error, but, in reality, they are but one assignment of error, to-wit: The trial court erred in dismissing appellant's complaint.

The sole issue in the cause sub judice is whether the previous litigation is res judicata as to the issues raised in appellant's complaint, as found by the trial court.

In State ex rel. Bd. of Ed. of Bratenahl Local School District v. State Bd. of Ed. supra, at 178, Supreme Court of Ohio stated that the Bratenahl Local School District "was properly dissolved on July 1, 1970 by the state board". In State ex rel. Board of Education of Bratenahl v. State Board of Education, supra, the Ohio Supreme Court again held that the Bratenahl School District was dissolved as of July 1, 1970.

It is true that the issue of the constitutionality of R.C. 3311.29 was not raised in any of the previous litigation involving the dissolution of the Bratenahl School District and its merger with the Cleveland School District.

The doctrine of res judicata has been part of the law of Ohio for many years and is rooted in Roman Law. See State ex rel. Ohio Water Service Co. v. Mahoning Valley Sanitary District, 169 Ohio St. 31, 34 (1959). The doctrine was explained in Grant v. Ramsey, 18 Ohio St. 158 (1857), as follows:

> "We may remark, in the words of Lord Kenyon, that 'if an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps some objection or argument might have been waged upon the first trial which would have led to a different judgment.' In such a case, the matter in dispute having passed in rem judicatam, the former decision is conclusive between the parties, if either attempts, by commencing another action, to reopen the question."

The doctrine of res judicata has been held to bar a subsequent action between the same parties or *their privies*

based upon the same cause of action as to all germane matters that were or could have been raised in the earlier action. See City of Cincinnati, ex rel. Crotty v. Cincinnati, 50 Ohio St. 2d 27 (1977); State ex rel. Ohio Water Service Co. v. Mahoning Valley Sanitary District, supra. (emphasis added)

It is obvious that the Bratenahl Board of Education had an opportunity to raise the question of the constitutionality of R.C. 3311.39 in the previous litigation involving said Board in the Supreme Court of Ohio but did not do so. Any action by said Bratenahl Board of Education raising a question of the constitutionality of R.C. 3311.39 would be barred by the doctrine of res judicata.

Appellant argues that, while the doctrine of res judicata may apply to the Bratenahl Board of Education, it does not apply to appellant because he was not a party to said litigation.

However, as stated above, the doctrine of res judicata applies to the same parties *or their privies*. As to whether appellant, as a resident citizen and taxpayer of the Bratenahl Local School District, is a privy of the Bratenahl Board of Education, we conclude the question must be answered in the affirmative in light of City of Cincinnati ex rel. Crotty v. Cincinnati, supra, where the court said at page 28:

> "It is a generally accepted rule that in absence of fraud or collusion, a judgment for or against a governmental body, such as a municipal corporation, is binding and conclusive as res judicata on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest, except where the proceedings were not of an adversary character."

The Bratenahl Board of Education is a governmental body. As a resident, citizen and taxpayer, appellant was represented, as to Bratenahl Local School District matters, by the Board of Education of said district.

We conclude the trial court properly dismissed appellant's taxpayer suit on the basis of the doctrine of res judicata.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

O'Neill, P.J.
Donofrio, J. and
Cook, J. Concur

Robert E. Cook,
Judge

Dated:
December 6, 1979

PROPOSITIONS OF LAW SET FORTH IN THE MEMORANDUM IN SUPPORT OF JURISDICTION DATED JANUARY 29, 1980 AND FILED BY SIDNEY STROMBERG IN THE SUPREME COURT OF OHIO

SIDNEY STROMBERG, *Appellant,* vs. BOARD OF EDUCATION, et al., *Appellees.*	**C.A. No. 41011** **Memorandum In Support of Jurisdiction**

Proposition of Law No. 1:

The Doctrine of Res Judicata has no Application to an Administrative Order or Adjudication that Violates the Provisions of the Due Process Clauses of the Constitutions of the United States and the State of Ohio.

Proposition of Law No. 2:

An Adjudication or Order Rendered Under Authority of a Void Statute is not Res Judicata of the Issue of Unconstitutionality when it is Raised in a Different Cause of Action.

Proposition of Law No. 3:

In the Absence of a Voluntary Agreement to Merge, the Order of the State Board of Education Providing for an Equitable Distribution of the Property, Assets and Indebtedness of the Dissolved School District into the Merging School District Under Authority of Section 3311.29 of the Revised Code, that Makes no Provision for a Hearing and an Opportunity for Review in any Court, Amounts to the Delegation of a Purely Arbitrary and Unconstitutional Power.

Proposition of Law No. 4:

In the Absence of a Voluntary Agreement to Merge, the Order of the State Board of Education Providing for an Equitable Distribution of the Property, Assets and Indebtedness of the Dissolved School District into the Merging School District Under Authority of Section 3311.29 of the Revised Code, Constitutes an Unlawful Delegation of a Judicial Power.

Proposition of Law No. 5:

Revised Code Section 3311.29, Authorizing an Administrative Dissolution and Merger of a School District, and the Transfer of Assets to the Newly Created District, Violates Article VI, Section 3, of the Ohio Constitution.

June 20, 1978

THOMAS V. KOYKKA, Esquire
Arter & Hadden
1144 Union Commerce Bldg.
Cleveland, Ohio 44115

Re: Board of Education, Bratenahl Local School District v. State Board of Education of Ohio, et al., A-1066

Dear Mr. Koykka:

Your application for stay in the above-entitled case has been presented to Mr. Justice Stewart, who has endorsed thereon the following:

"Application denied
June 19, 1978
Potter Stewart"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

LAURENCE P. GILL
Deputy Clerk

th

cc: JOHN D. HOLSCHUH, Esquire
Alexander, Ebinger, Holschuh,
Fisher & McAlister
17 South High Street
Columbus, Ohio 43215

THOMAS V. KOYKKA, Esquire
Arter & Hadden
1144 Union Commerce Bldg.
Cleveland, Ohio 44115

Re: Board of Education, Bratenahl Local School District v. State Board of Education of Ohio, et al., A-1066

Dear Mr. Koykka:

The Court today entered the following order in the above-entitled case:

"The application for stay of the judgment of the Supreme Court of Ohio, presented to Mr. Justice Stevens and by him referred to the Court, is denied."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

FRANCIS J. LORSON
Deputy Clerk

cc: JOHN D. HOLSCHUH, Esquire
Alexander, Ebinger, Holschuh,
Fisher & McAlister
17 South High Street
Columbus, Ohio 43215

TABLE OF CONTENTS AND QUESTIONS PRESENTED SET FORTH IN THE PETITION FOR WRIT OF CERTIORARI DATED AUGUST 1, 1978 AND FILED BY BOARD OF EDUCATION, BRATENAHL LOCAL SCHOOL DISTRICT IN THE SUPREME COURT OF THE UNITED STATES (BRATENAHL I)

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS 1

A. In This Proceeding, the State of Ohio has Undertaken to Destroy the 80-Year Old Bratenahl School System and to Take Its Property, Without the Due Process Guaranteed by the Fourteenth Amendment 2

B. The State of Ohio Has Also Denied Bratenahl Due Process by Stripping It, Without Notice or Opportunity to Be Heard, of Rights Adjudicated and Vested by Final Judgments in Prior Litigation Between the Same Parties on the Same Issue 3

1. Upon statutory review, Ohio's 1970 dissolution order was vacated by final judgment in 1973, before the present proceeding was commenced 3

2. In a separate declaratory judgment action before the proceeding now here for review was commenced, it was adjudicated by final judgment that the Bratenahl Local School District legally exists 6

C. In the Present, Subsequently Commenced Proceeding Now Here for Review, the State of Ohio Has Further Deprived Bratenahl of Due Process by Depriving It of Rights Under the Prior Judgments 7

JURISDICTION 9

QUESTIONS PRESENTED 9

CONSTITUTION, STATUTES AND REGULATIONS 10

—The Constitution 10

—The Statute 10

—The Regulations 10

STATEMENT OF THE CASE 11

—Genesis of the Problem 11

—Then the Law was Changed 12

—The New Standard Bratenahl Could Meet 12

—Leave to Establish High School Denied 13

—Litigation Ensued 13

(i) Upon statutory review the February 9, 1970, order was vacated by final judgment 13

(ii) In separate declaratory judgment suit Bratenahl was, by final judgment, on August 30, 1973, adjudicated legally to exist 13

—A New Attack Was Launched 14

—The Result in the Supreme Court of Ohio 15

REASONS FOR GRANT OF WRIT 16

1. By state action Bratenahl is destroyed and despoiled of its property 16

2. The most elementary demand of due process, here denied, is notice and hearing 17

3. Refusal to give res judicata effect to the two prior final judgments in earlier litigation between the same parties on the same issue is a denial of due process 18

4. Failure to give effect to the change in the law is a denial of due process 21

CONCLUSION 22

QUESTIONS PRESENTED

This case brings here for review the questions:

1. Whether a State denies due process within the meaning of the Fourteenth Amendment when, without notice or hearing, and without judicial review, it orders dissolved an 80-year old public school district and orders its assets transferred to another district.
2. Whether a State denies due process within the meaning of the Fourteenth Amendment when it denies *res judicata* effect to prior final judgments on the same issue between the same parties.
3. Whether a State denies due process within the meaning of the Fourteenth Amendment when it applies prior law, subsequently changed, and fails to apply the law in effect at the time of decision.

OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 2, 1978

JOHN D. HOLSCHUH, Esq.
Alexander, Ebinger, et al.
17 South High St.
Columbus, Ohio 43215

Re: Board of Education Bratenahl, Ohio, Local School District v. State Board of Education of Ohio, et al., No. 78-170

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

J. H. LAZOWSKI
Assistant Clerk

Ohio Revised Code (Eff. 12-1-67)

§ 3311.29 School district must maintain public school; exceptions.

No school district shall be created and after July 1, 1968, no school district shall exist which does not maintain within such district public schools consisting of grades one through twelve, inclusive, and any such existing school district not maintaining such schools after such date shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, and other factors make compliance impracticable.

The superintendent of public instruction is without authority to distribute funds under sections 3317.02 and 3317.06 of the Revised Code to any school district which after July 1, 1968, does not maintain schools with grades one through twelve, inclusive, and to which no exception has been granted by the state board of education.

Ohio Revised Code (Eff. 9-30-75)

§ 3311.29 School district must maintain public school; exceptions.

Except for a joint vocational school district, no school district shall be created and no school district shall exist which does not main' in within such district public schools consisting of grad. . kindergarten through twelve and any such existing school district not maintaining such schools shall be dissolved and its territory joined with another school district or districts by order of the state board of education if no agreement is made among the surrounding districts voluntarily, which order shall provide an equitable division of the funds, property, and indebtedness of the dissolved school district among the districts receiving its territory. The state board of education may authorize exceptions to school districts where topography, sparsity of population, ar l other factors make compliance impracticable.

The superintendent of public instruction is without authority to distribute funds under sections 3317.022 [3317.02.2] to 3317.025 [3317.02.5] of the Revised Code to any school district that does not maintain schools with grades kindergarten through twelve and to which no exception has been granted by the state board of education.

WISS, APPELLEE *v.*
CUYAHOGA COUNTY BOARD OF ELECTIONS, APPELLANT.

[Cite as Wiss v. Bd. of Elections (1980),
61 Ohio St. 2d – (published OHIO BAR, Vol. LIII,
No. 11, March 17, 1980)]

Mandamus – Elections – To compel restoration of candidate's name to ballot – Properly denied, when – Nominating petition invalid.

(No. 79-1476 – Decided March 12, 1980.)

APPEAL from the Court of Appeals for Cuyahoga County.

On November 2, 1979, R. Garin Wiss, appellee herein, initiated an original action in mandamus in the Court of Appeals, seeking an order requiring the Cuyahoga County Board of Elections to restore his name to the ballot as a candidate for the Cuyahoga County Board of Education at the November 6, 1979, general election. The board had determined that the appellee's nominating petition was invalid and had removed his name from the ballot for the reason that, as a resident of the village of Bratenahl, appellee would be ineligible to serve as a member of the county board of education if elected.

On November 5, 1979, the Court of Appeals granted the writ of mandamus and ordered the board of elections to place appellee's name on the ballot as a candidate for the Cuyahoga County Board of Education at the November 6, 1979, election. The board of elections was further ordered to count the votes cast for such office, but to withhold certification of the results until the status of the Bratenahl Local School District had been adjudicated.

The cause is now before this court upon an appeal as of right.

Messrs. Wegman, Hessler & Vanderburg and *Mr. Daniel D. Wilt,* for appellee.

Mr. John T. Corrigan, prosecuting attorney, and *Mr. David A. Williamson,* for appellant.

Per Curiam. As a resident and elector of the village of Bratenahl, appellee would be ineligible to be a member of the Cuyahoga County Board of Education under R. C. 3311.05 and 3311.052 if the Bratenahl Local School District has been dissolved and its territory merged with that of the Cleveland City School District.

The questions before the court are then: (1) Has the Bratenahl Local School District been dissolved; and (2) if so, did the board of elections properly rule appellee's nominating petition invalid?

I.

The status of the Bratenahl Local School District has been the subject of extensive litigation, some continuing. *State, ex rel. Bd. of Edn.* v. *State Bd. of Edn.* (1978), 53 Ohio St. 2d 173, certiorari denied, 439 U.S. 865 (*Bratenahl I*), *State ex rel. Bd. of Edn.* v. *State Bd. of Edn.* (1979), 58 Ohio St. 2d 189 (*Bratenahl II*), *Wilt* v. *State Bd. of Edn.* (C.A. 6, 1978), 608 F. 2d 1126, *Stromberg* v. *Bd. of Edn.*, Cuyahoga County Ct. of App., Case No. 41011, pending.

A review of these cases shows that the status of the Bratenahl School District has been established and the same was dissolved on July 1, 1970, and the issue is *res judicata.*

In *Bratenahl I, supra,* the court stated at page 178:

". . . This court concludes that the Bratenahl Local School District was properly dissolved on July 1, 1970, by the state board."

Appellee argues (correctly) that the law of a Supreme Court case is stated in the syllabus thereto and concludes (incorrectly) that since the quoted language is not in the syllabus it is of no effect. The syllabus of a case must be read in light of facts in the case. In *Bratenahl I, supra,* the

determination that the Bratenahl School District had been dissolved in 1970 was a *sine qua non* underpinning to the court's syllabus. Should there be any question concerning whether this court arrived at such a determination, it was dispelled by this court's blunt statement in *Bratenahl II, supra,* at page 190:

"The decision of this court, on March 22, 1978, in *State, ex rel. Bd. of Edn., supra (Bratenahl I, supra),* held that the 1970 refusal of the state board to grant an extension was not 'appealable,' and that the school district was properly dissolved on July 1, 1970."

In *Wilt* v. *Bd. of Edn. supra,* the federal circuit court also found this issue to be *res judicata.*

Appellee insists that the Bratenahl controversy is still alive because the constitutionality of R. C. 3311.29, the statute empowering the state board to dissolve the Bratenahl School District, is under attack in *Stromberg, supra,* a case pending in the Cuyahoga County Court of Appeals.

This rationale for qualifying the Bratenahl Issue as viable is tenuous at best. An allegation of unconstitutionality of a statute in a case pending in a lower court is not justification for overturning a determination twice made by this court.

II.

R. C. 3311.052 requires that members of a county board of education are to be elected ". . . from the qualified electors *residing in the county school district territory,*" and "county school district" as defined in R. C. 3311.05, in part, as "[t]he territory within the territorial limits of a county, *exclusive of the territory embraced in any city school district.* . . ." (Emphasis added).

Appellee has stated in his complaint that he is a ". . . qualified elector of the Village of Bratenahl, Ohio." Therefore, since the Bratenahl School District has been

dissolved and its former territory merged with the Cleveland City School District, appellee is ineligible to serve on the Cuyahoga County Board of Education.

In this case, the board of elections, *sua sponte,* reviewed the sufficiency of appellee's petition papers and found them wanting due to appellee's residence outside the territorial area of the office to which he sought election. Such spontaneous action by a board without a prior protest has been recognized by this court in *State, ex rel. McGinley* v. *Bliss* (1948), 149 Ohio St. 329. This action by the board is authorized by the broad grant of power vested in it by R. C. 3501.11 which states:

"Each board of elections . . . shall:

". . .

"(K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers."

There is no requirement of notice and hearing in R. C. 3501.11(K) and this court has refused to read one into it, *McGinley, supra.*

Absent any allegation of fraud, it would seem incongruous to give a board of elections power to review nominating petitions without also giving it the right to disqualify a potential nominee when, on its face, his nominating petition indicates his ineligibility for the office that he seeks.

Accordingly the judgment of the Court of Appeals is reversed, and the writ of mandamus is denied.

Judgment reversed.

CELEBREZZE, C. J., HERBERT, W. BROWN, P. BROWN, SWEENEY, LOCHER and HOLMES, J. J., concur.